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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No. 264

WILLIAM F. DROHAN AND DANIEL D. CARMELL, AS TRUSTEES FOR KEESHIN MOTOR EXPRESS CO., INC., IN REORGANIZATION CAUSE 46-B-26 NORTHEAST DISTRICT OF ILLINOIS,

Plaintiffs-Respondents,

vs.

STANDARD OIL COMPANY, A CORPORATION,

Defendant-Petitioner.

STANDARD OIL COMPANY, A CORPORATION,

Cross-Claimant-Petitioner,

vs.

KEESHIN MOTOR EXPRESS CO., INC., A CORPORATION; AND C. A. CONKLIN TRUCK LINE, INC., A CORPORATION,

Cross-Defendants-Respondents.

MARTHA NICHOLS, AS ADMINISTRATRIX OF THE ESTATE OF FERRIS NICHOLS, DECEASED,

Cross-Claimant-Petitioner,

vs.

KEESHIN MOTOR EXPRESS CO., INC., A CORPORATION; AND C. A. CONKLIN TRUCK LINE, INC., A CORPORATION,

Cross-Defendants-Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT OF PETITION.

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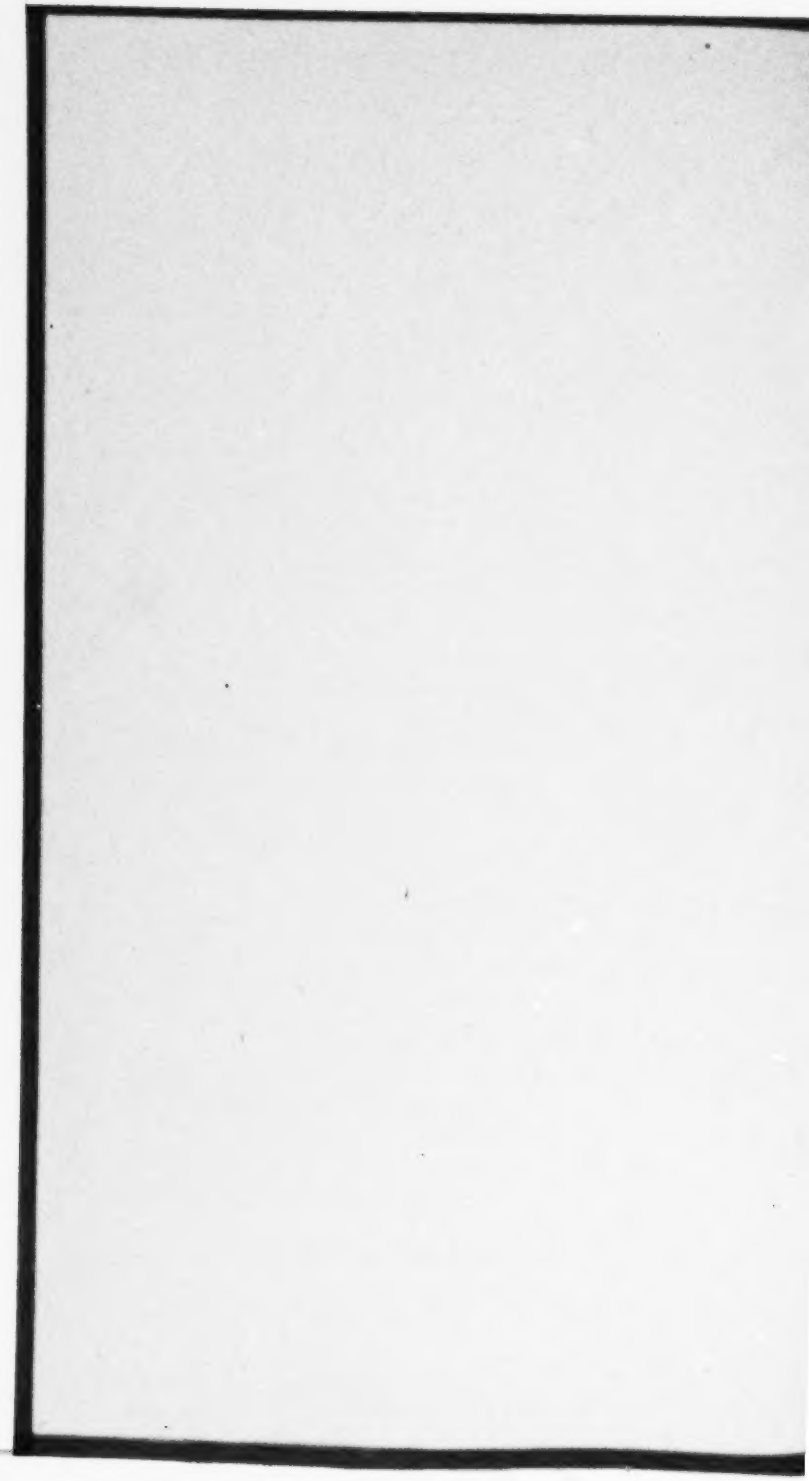

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To the Honorable Fred M. Vinson, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States.

Your Petitioners, Standard Oil Company, a corporation,

and Martha Nichols, as Administratrix of the Estate of Ferris Nichols, deceased, respectfully petition your Honorable Court for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit, and, in support of said petition, would respectfully show the Court as follows:

Summary Statement of Matter Involved.[1]

This action was commenced in the United States District Court for the Northern District of Indiana by Keeshin Motor Express Co., Inc., respondent herein, hereinafter called "Keeshin," against Standard Oil Company, petitioner herein, hereinafter called "Standard," to recover a money judgment for damages to a Keeshin tractor-trailer and cargo, alleged to have been caused by the negligence of Standard as a result of a collision on U. S. Highway 20 near Michigan City, Indiana, in the night time (R. 1). Keeshin subsequently became involved in bankruptcy proceedings, and the respondents, Drohan and Carmell, as Trustees, were substituted as parties plaintiff. (R. 44.)

Standard answered and filed a cross-claim against the plaintiffs, joining as a cross-defendant, the respondent, C. A. Conklin Truck Line, Inc., hereinafter called "Conklin," seeking to recover damages for loss of its own tractor-trailer and cargo in the same collision, alleging that such loss was caused by the negligence of Conklin in the operation of its tractor-trailer, the failure of the operator of its vehicle to observe certain statutory requirements, and also alleging that the negligence of Keeshin contributed to Standard's loss. (R. 12.)

Martha Nichols, Administratix of the Estate of Ferris Nichols, hereinafter called "Nichols," was permitted to intervene and file her cross-claim against Keeshin and

1. References to the record are to the record as printed in the Circuit Court of Appeals, copies of which were filed in this Court.

onklin. She sought to recover damages for the alleged rongful death of her husband, Ferris Nichols, the driver f the Standard equipment, which she stated was caused y the negligence of Keeshin and Conklin in the same ccident. (R. 27.)

The questions involved under the issues joined by the omplaint, answers thereto, the cross-claims, and the nswers thereto, were whether or not Standard had been uilty of negligence proximately causing the damage to Keeshin or whether or not Keeshin or Conklin or both had een guilty of negligence proximately causing the death f Ferris Nichols and the damage to Standard.

The question of contributory negligence on the part of Keeshin, Ferris Nichols, or Standard was also in issue. Under Indiana law, any amount of contributory negligence, however slight, will prevent recovery.

Trial was had before a jury which returned a verdict for Keeshin against Standard and returned verdicts for Keeshin and Conklin on the cross-claims of Standard and Nichols (R. 260). Judgments were duly entered on the verdicts (R. 261), and Standard and Nichols thereafter appealed to the United States Circuit Court of Appeals for the Seventh Circuit (R. 276). The Court of Appeals affirmed the judgment on June 8, 1948 with an opinion which appears in the record herein and which is reported in 168 Fed. (2) 761. The Court of Appeals denied a petition for rehearing on July 26, 1948, and the mandate of that Court was issued to the District Court on August 2, 1948.

This Court Has Jurisdiction.

The jurisdiction of this Court is invoked under *Section 240 of the Judicial Code,* as amended by the *Act of February 13, 1925* (*28 USCA 347*); likewise, under and by

virtue of *Rule 38 (5) (b) of the Rules of the Supreme Court of the United States.* The petition for rehearing was denied by the Circuit Court of Appeals on July 26, 1948, and this petition is filed within three months of said date.

Questions Presented.

The questions which Standard and Nichols present for the consideration of the Court and in respect of which certiorari is sought are as follows:

First: Whether the Circuit Court of Appeals failed to adhere to and apply the doctrine of *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, 58 S. Ct. 817, when it approved an instruction given by the District Court to the jury directing a verdict for Keeshin if the jury found from the evidence that Nichols, the operator of the Standard vehicle, failed "to regularly and continuously observe the highway ahead of him so as to discover any vehicle or other conveyance on the highway." (This instruction was given by the trial court (R. 208), and petitioners duly objected thereto (R. 221). The Circuit Court of Appeals specifically approved this instruction in its opinion as stating the law of Indiana.)

Second: Whether the Circuit Court of Appeals failed to adhere to and apply the doctrine of *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, 58 S. Ct. 817, when it approved an instruction given by the District Court to the jury, directing a verdict for Keeshin if the jury found that Nichols, the operator of the Standard equipment, failed to so restrict the speed of his vehicle "as might be necessary to avoid colliding with any person, or vehicle or other conveyance on or near or entering the highway in compliance with legal requirements and with the duty of all persons to use due care." (This instruction was given by the trial court to the jury (R. 208) and petitioners duly objected thereto

(R. 221). The Circuit Court of Appeals held the instruction to state the law.)

Reasons Relied On for the Allowance of the Writ.

Petitioners submit that they present by this petition a controversy of importance with respect to legal principles and the trial of cases in the federal courts in the State of Indiana. The United States Circuit Court of Appeals for the Seventh Circuit has rendered a decision in a way probably not in accord with the applicable decisions of this court (*Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817). The United States Circuit Court of Appeals has decided important questions of Indiana law in a way clearly in conflict with applicable decisions of the Supreme Court of Indiana.

(a) The decision of the Circuit Court of Appeals results in two separate standards of care as to the exercise of the duty to maintain a lookout, for motorists in Indiana. If federal jurisdiction is present and availed of, a motorist is required to regularly and continuously observe the highway so as to discover any vehicle or other conveyance on the highway. Under such an instruction, the mere fact of collision renders the motorist guilty of negligence as a matter of law. The duty is absolute. On the other hand, if federal jurisdiction is not present, the motorist is required to exercise ordinary care only or the care which a reasonably prudent person would exercise under the same or similar circumstances.

(b) The decision of the Circuit Court of Appeals results in two separate standards of care for motorists in Indiana as to the duty to control the speed of vehicles upon the highways. If federal jurisdiction exists and is availed of, the motorist must so restrict the speed of his vehicle as to avoid colliding with any person or vehicle or conveyance on or near or entering the highway. Under such an instruc-

tion, as is true under (a) above, the mere fact of collision would render the motorist guilty of negligence as a matter of law. The duty is absolute. On the other hand, if federal jurisdiction is absent, the motorist is required only to exercise ordinary care or the care which a reasonably prudent person would exercise under the same or similar circumstances.

The questions presented are of substance and importance because of the substantial amount of litigation in the federal courts in Indiana which will be affected by the decision, as will be pointed out more particularly in the brief, *post*.

It is submitted that this case presents a proper case for the exercise of the jurisdiction of this court to review the decision of the Circuit Court of Appeals for the reason that to permit the decision of the lower court to stand will result in the application of two divergent and conflicting rules in the State of Indiana—one to be applied in state courts and the other to be availed of in the federal courts in cases of diversity of citizenship.

WHEREFORE, your petitioners pray that a writ of certiorari issue from this Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit to the end that this cause may be reviewed and determined by this Court and that the judgment herein of said Circuit Court of Appeals be reversed by this Court, and for such other and further relief as to the Court may seem proper.

Dated this 31st day of August, 1948.

RICHARD P. TINKHAM,
JOHN F. BECKMAN, JR.,
Attorneys for Petitioner Standard Oil Company.
WALTER C. WILLIAMS,
Attorney for Petitioner Martha Nichols as Administratrix.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit is reported in 168 F. (2) 761. It is also contained in the record filed herewith.

The jurisdictional statement and the statement of the case are set forth in the petition, to which reference is hereby made. The errors relied upon are set forth by the questions presented as contained in the petition (*supra*, page 4).

ARGUMENT.

I.

The Nature and Importance of the Questions Presented.

The questions presented involve a controversy with respect to legal principles and not facts, inasmuch as petitioners contend that the Circuit Court of Appeals failed and refused to follow and apply the law of the State of Indiana to two separate instructions[1] tendered by respondents and given by the District Court to the jury over the objections of petitioners (R. 221). The Circuit Court of Appeals has decided important questions of Indiana law in a way clearly in conflict with applicable decisions of the State of Indiana (Supreme Court Rule 38 (5) (b)) and thus has likewise determined a federal question in a way in conflict with the decision of this Court in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817.

Quite apart from the merits of the case, the petitioners submit that the questions involved are of sufficient substance and importance to warrant the exercise of this Court of its discretionary right to review.

This Court has held that the doctrine of *Erie* v. *Tompkins, supra,* must be observed by federal courts and the failure to observe it has constituted an important ground for the exercise of this Court's right to review. In the case of *Guaranty Trust Co.* v. *York* (1945), 326 U. S. 99, 112, 89 L. Ed. 2079, 65 S. Ct. 1464, this Court granted certiorari and reversed the Circuit Court of Appeals for the Second

1. The fact that instructions to the jury are involved does not lessen the "review-worthiness" of the questions presented. In approving the instructions, the opinion of the Circuit Court of Appeals has effectively created "a double system of conflicting laws in the same state" which will affect the substantial rights of all motor vehicle litigants in the Indiana federal courts. As will be demonstrated hereinafter, these same instructions if given in the state court would have constituted reversible error.

Circuit for failure to apply a statute of the State of New York, and said:

> "The source of substantive rights enforced by a federal court under diversity jurisdiction, it cannot be said too often, is the law of the states. Whenever that law is authoritatively declared by a state, whether its voice be the Legislature or the highest court, such law ought to govern in litigation founded upon that law, whether the forum of application is a state or a federal court * * *."

In the case of *Fidelity Union Trust Co.* v. *Field,* 311 U. S. 169, 61 S. Ct. 176, the Circuit Court of Appeals for the Third Circuit declined to follow the decisions of the Chancery Court of New Jersey, relying instead on its interpretation of a New Jersey statute. The Court held the question of sufficient substance and importance to grant the petition for a writ of certiorari and subsequently to reverse the decision of the Circuit Court of Appeals. For a collection of cases where similar questions involving the failure of the lower court to follow applicable state law have been deemed sufficient to warrant review by this Court, see: (Note 55, 11 Cyc. Fed. Proc., 2d Ed., p. 24).

The questions presented involve the law applicable to the operation of motor vehicles in Indiana. They are important because of the large, and rapidly increasing, number of persons who will be affected by the conflicting rules which the decision establishes[2]. Probably no other single source is such a prolific and constant feeder of litigation into the state and federal courts of Indiana. Being the

2. Indiana registered 1,075,257 motor vehicles in 1946. According to the Traffic Safety Commission of the State of Indiana, the following are the statistics on motor vehicle accidents in the state for the past seven years:

Year	No. of Reported Accidents	Persons Killed	Persons Injured
1941.....	44,737	1,478	21,504
1942.....	30,170	1,016	12,687
1943.....	27,829	717	10,545
1944.....	44,885	784	14,280
1945.....	54,028	860	16,945
1946.....	69,196	995	22,375
1947.....	69,423	1,109	23,398

cross-roads state that it is, Indiana roads are constantly traversed by millions of cars from the surrounding states.

In federal district courts in Indiana, a substantial percentage of all cases filed involve questions of personal injury as a result of motor vehicle accidents as revealed by the following table[3]:

Year	No. of Civil Cases of All Types Filed	No. of Negligence Cases Filed	No. of Motor Vehicle Personal Injury Negligence Cases Filed
1941.....	448	74	50
1942.....	486	64	30
1943.....	419	64	46
1944.....	400	64	38
1945.....	522	49	31
1946.....	613	58	35
1947.....	708	80	60
1948.....	575	93	59

It is significant to note that the principle decided by the Circuit Court of Appeals applies not only to the motor vehicle personal injury cases in the federal courts, but applies with equal force to all negligence cases.

It is of utmost importance, therefore, to the motorist-litigants in Indiana, both residents and non-residents, and to the some 4,000 Indiana attorneys who daily handle their cases that the laws concerning the operation of motor vehicles be uniformly applied and that there do not exist two divergent and conflicting rules—one to be applied in the state courts and the other to be availed of in the federal courts in cases of diversity of citizenship.

Under the decision of the Circuit Court of Appeals, the amount or degree of care a motorist must exercise in Indiana depends upon variable combinations of the following conditions: (1) His own residence; (2) The residence of the motorist with whose vehicle he collides; (3) The amount of damages sustained; and (4) Whether the attor-

3. According to information furnished by the Division of Procedural Studies and Statistics of the Administrative Office of the United States Courts.

neys for the parties file the case in, or remove it to, the federal court.[4]

II.[5]

The Circuit Court of Appeals Erred in Permitting a Judgment to Stand Which Was Predicated Upon an Instruction Directing a Verdict Against Petitioners and Which Instruction Charged the Operator of the Standard Vehicle With an Absolute Duty "to Regularly and Continuously Observe the Highway Ahead of Him so as to Discover Any Vehicle or Other Conveyance on the Highway."

The District Court instructed the jury to return a verdict in favor of Keeshin if it found from the evidence that Ferris Nichols, the operator of the Standard vehicle, "failed to regularly and continuously observe the highway ahead of him, and if * * * such failure proximately contributed to cause his injury and death and the damage sustained by" Standard (R. 208). Thus, the mere proof of the fact of collision, which was conceded, rendered Nichols and Standard guilty of negligence.[6]

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4. In establishing a guiding principle for the application of the rule in the *Erie R. Co.* case, this Court said:

> "The operation of a double system of conflicting laws in the same state is plainly hostile to the reign of law. Certainly, the fortuitous circumstance of residence out of a state of one of the parties to a litigation ought not to give rise to a discrimination against others equally concerned but locally resident." (*Guaranty Trust Co.* v. *York* (1945), 326 U. S. 99, 112, 89 L. Ed. 2079, 65 S. Ct. 1464.)

5. Petitioners recognize the practice that the petition for writ of certiorari and brief in support thereof are generally concerned solely with whether or not the questions presented are of sufficient substance and importance to warrant a review by this Court. However, in this case, the opinion of the Circuit Court of Appeals is so written that it appears on its face to adhere to the rules of decision of the State of Indiana. Therefore, it becomes essential to demonstrate to this Court that such is not the fact, and that since the opinion, two divergent and conflicting rules exist.

6. The question is squarely presented to this Court. The opinion of the Circuit Court of Appeals specifically holds that under the law of Indiana a motorist must "regularly and continuously observe the highway ahead of him so as to discover any vehicle * * * on the highway," *i. e.*, the interpretation here placed upon the instruction by petitioners accords with that of the Circuit Court of Appeals.

The giving of the above instruction was clearly reversible error under the law of the State of Indiana. The leading case on this subject is that of *Martin* v. *Lilly* (1919), 188 Ind. 139, 121 N. E. 443, 445, in which the trial court gave the following instruction:

> "No. 8. It is the duty of the driver of an automobile while driving the same upon a public highway to be constantly on the lookout for pedestrians and other persons or vehicles that may at the time be making use of the highway. And if you believe from the evidence that the driver of the automobile did not keep a constant lookout while so driving said automobile, and that because of such failure on his part, the accident here in question occurred, then the Court instructs you that you would be authorized to find such driver negligent."

In reversing a judgment for the plaintiff, the Supreme Court of Indiana said:

> "This instruction is erroneous. The driver of this automobile was required to use the care which an ordinarily prudent person would exercise in like circumstances. This is the care required by law. Whether conduct in a given set of circumstances measures up to this is for the jury. The jury must be permitted to determine whether this care requires 'constant lookout' or something else, in the circumstances shown by the evidence. When such an instruction as No. 8 is given, it cannot be cured by others which state the rule correctly; because, every time the Court tells the jury in other instructions that the driver is required to use the care that an ordinarily prudent person would exercise in like circumstances, the jurors, if obedient to the oath, are bound to observe that this means 'constant lookout'."

This decision has been cited and approved in the following later cases:

> *Frank Bird Transfer Co.* v. *Shaw* (1919), 72 Ind. App. 658, 124 N.E. 776, 777.

Ind. Rys. & Light Co. v. *Armstrong* (1923), 79 Ind. App. 486, 138 N.E. 830.

Toenges v. *Walter* (1941), 109 Ind. App. 41, 32 N.E. (2) 95, 97.

Northwestern Transit Co. v. *Wagner* (1945), ___ Ind. ___, 61 N.E. (2) 591, 593.

In the recent *Northwestern Transit* case, *supra*, the Court said: (61 N.E. (2) 591, 593)

> "It has been held that an instruction to the effect that there is a duty upon a driver upon a highway to be constantly on the lookout for other vehicles using the highway is erroneous; and that the duty of a driver is to use the care which an ordinarily prudent person would exercise in a like circumstance; and that it is for the jury to determine whether this care requires a constant lookout or something else in the circumstances shown by the evidence." (Citing *Martin* v. *Lilly*)

It should be observed that the fact that the Court may have also instructed the jury, as suggested in the opinion of the Circuit Court of Appeals, that an operator of an automobile is required to keep a reasonable lookout for other vehicles and use that degree of care which a reasonable and prudent person would exercise, does not cure the erroneous instruction, the reason being, as pointed out in the *Martin* case, that under such a set of circumstances, "reasonable care" means "to regularly and continuously observe the highway ahead of him."

It should also be pointed out that the effort of the Circuit Court of Appeals to distinguish the *Wagner* case on the ground that the case did not involve any question of instructions is wholly invalid and just as untenable as an argument that the *Wagner* case was between other parties. In the *Wagner* case, the highest court in Indiana again emphasizes the rule of law that an instruction such as this is reversible error, and the case is certainly part of the

available information from which it is the duty of the Court to ascertain the law of Indiana. (See Footnote 7, *post*)

The Circuit Court of Appeals relies on the case of *Pfisterer* v. *Key* (1941), 218 Ind. 521, 33 N.E. (2) 330. It will be observed that this case is subsequent to the *Martin* case but prior to the decision of the *Wagner* case.

The *Pfisterer* case was before the appellate courts of Indiana on two occasions. It was decided with opinion by the Appellate Court (27 N.E. (2) 892) and subsequently by the Supreme Court (218 Ind. 521, 33 N.E. (2) 330). Inasmuch as the Supreme Court opinion omits some of the vital facts, we must look to the opinion of the Appellate Court in order to obtain the full facts and trial data involved[7]. In this case, plaintiff's decedent, a minor, was walking on the left side of a road in broad daylight. The road was straight, 18 feet in width, with a 3-foot berm. The defendant was operating an auto at 45 miles per hour toward the decedent. The defendant's evidence was that he did not see decedent until he was 15 or 20 feet away, and that then he attempted to turn out, but hit the decedent.

The first paragraph of the complaint charged negligence in three particulars—(1) Failure to give a signal or warning; (2) Failure to keep a watch or lookout; and (3) Failure to slow down or slacken speed.

The second paragraph of the complaint included the above allegations of negligence, but added another, which stated that there was ample room on the highway for the defendant to turn out and avoid the collision.

The Court gave an instruction to the jury that the defendant was bound "to constantly observe the highway

7. As was pointedly stated in *West* v. *American Tel. & Tel. Co.* (1940), 311 U. S. 223, 237, 85 L. Ed. 139, 61 S. Ct. 179:

"State law is to be applied in the federal as well as the state courts, *and it is the duty of the former in every case to ascertain from all the available data* what the state law is, and apply it rather than to prescribe a different rule * * *." (Our italics.)

in front of him so as to discover other vehicles or pedestrians thereon." The giving of this instruction was contended on appeal to have been reversible error.

Interrogatories were submitted to the jury, among which was Interrogatory No. 38, which read as follows:

> "After the defendant actually saw Charles Key (plaintiff's decedent) walking upon the traveled portion of the highway before the collision, was there any reasonable opportunity for the defendant to turn his automobile aside enough to entirely miss the body of plaintiff's son as he walked upon the highway?" (27 N.E. (2) 892, 894)

The jury answered this interrogatory in the affirmative, therefore finding the defendant guilty on the additional count of negligence contained in the second paragraph. In affirming the case, the Supreme Court of Indiana said: (33 N.E. (2) 330, 335)

> "But even though the instruction could be said to be erroneous, we think it harmless for the reason that under the evidence *and the other facts as found by the jury* as disclosed by their answers to the interrogatories, the jury could have reached no other conclusion than that the appellant himself was guilty of negligence." (Our italics)

It is thus eminently clear that the Supreme Court, in affirming the case, did not decide that the instruction given was *not* reversible error. What the Supreme Court did decide was that the jury found the defendant guilty of negligence in other particulars, *i.e.*, failure to turn out *after seeing decedent* and to avoid the collision although there was ample room and reasonable opportunity to do so as disclosed by the jury's answer to Interrogatory No. 38 and that, therefore, the giving of the erroneous instruction on the duty to keep a lookout was *harmless* error and thus not grounds for reversal.

We have no such situation in the case before this Court.

There were no interrogatories submitted to the jury. The verdict of the jury was general. The sole question left for the consideration of the jury under this instruction was whether the negligence of the Standard driver (presumed because of the collision) was the cause or a contributing cause of the accident.

The Circuit Court of Appeals further says in its opinion that the instruction to regularly and continuously observe the highway is justified by the provisions of Section 47-2004, Burns' Indiana Statutes, which makes it the duty of a driver having regard to the actual and potential hazards not to drive his vehicle at a speed greater than was reasonable and prudent. It is difficult to understand how a speed statute establishing a standard of reasonable and prudent care can be taken as authority for an instruction on lookout which makes the operator of every motor vehicle the insurer of the safety of cars and persons ahead and obliges such operator to proceed at his peril. (See III, *post*)

As a matter of fact, the rule that there is only one standard of care in Indiana, and that standard is reasonable care, is so firmly entrenched in the law of that state that in the recent case of *Heiny* v. *Pennsylvania R. Co.* (1943), 221 Ind. 367, 47 N.E. (2) 145, the Court had under consideration a statute which required that a motor vehicle operator upon the highway approaching a railroad crossing "shall first bring such vehicle to a full stop and shall ascertain definitely that no train, car, or engine is approaching such crossing, and is in such close proximity thereto as to create a hazard or danger of a collision." The lower court directed a verdict on the ground that the plaintiff's decedent, who was killed by a collision at the crossing, thus did not "ascertain definitely that no train" was approaching in compliance with the terms of the statute. The Supreme Court of Indiana reversed and sent the case back for new trial, stating:

"In this state, we recognize no degrees of actionable

> negligence other than that which results from the failure or refusal to exercise ordinary care. * * * We hold, therefore, that the decedent's conduct, like that of appellees', is to be measured by the standard of ordinary care. It will not be presumed that the decedent was guilty of contributory negligence merely because there was a collision between his truck and the locomotive."

Thus, the Supreme Court of Indiana has preserved and emphatically restated, since the decision in the *Pfisterer* case, the doctrine that reasonable care only is the measure of a person's conduct despite the fact that an Act of the Legislature appeared to raise the standard to one of the highest degree. Thus, even though the Circuit Court of Appeals is correct in its interpretation of the *Pfisterer* case, which petitioners deny, the subsequent *Heiny* case unmistakably and emphatically repudiates such an interpretation.

III.

The Circuit Court of Appeals Erred in Permitting a Judgment to Stand Which Was Predicated Upon an Erroneous Instruction Directing a Verdict Against Petitioners, Which Instruction Charged the Operator of the Standard Vehicle With an Absolute Duty to so Restrict the Speed of His Vehicle "as Might Be Necessary to Avoid Colliding With Any * * * Vehicle * * * on or Near or Entering the Highway in Compliance With Legal Requirements and With the Duty of All Persons to Use Due Care."

The instruction quoted above was taken from an Indiana statute (Burn's Ind. Statutes, 1933 (1940 Replacement), 47-2004). The entire section reads as follows:

> "No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and poten-

> tial hazards then existing. In every event, speed shall be so restricted as may be necessary to avoid colliding with any person, or vehicle or other conveyance on or near, or entering the highway in compliance with legal requirements and with the duty of all persons to use due care."

It is quite significant to notice that the first sentence of the statute charging motor vehicle operators with the duty of exercising reasonable care was entirely omitted from the instruction (R. 208).

The Circuit Court of Appeals in its opinion says that the prepositional phrase "in compliance with legal requirements and the duty of all persons to use due care" saves this instruction but expressly concedes it would otherwise be erroneous and reversible error under the leading cases of *Schlarb* v. *Henderson*, 211 Ind. 1, and *Opple* v. *Ray*, 208 Ind. 450.

In the *Schlarb* case, the giving of an instruction that it was negligence for the driver of an automobile to operate the same at such speed that he could not stop within the distance that objects could be seen ahead of him was held to be reversible error.

In the *Opple case*, (195 N. E. 81, 84) the Court said:

> "The conclusion is unavoidable that the hard and fast rule, that one who operates a motor car at night must equip his car with such lights, and proceed at such speed, and observe the way with such care, that he will see any dangerous obstruction in the highway, and that he must stop before collision and injury to himself under penalty of being chargeable with negligence contributory to his own injury, is basically and fundamentally unsound, and the question of negligence must be determined from the facts and circumstances in each case."

The position taken by the Circuit Court of Appeals is unsound and contrary to the law of Indiana. The identical

proposition was urged upon the Indiana court in the case of *Rump* v. *Woods* (1912), 50 Ind. App. 347, 98 N. E. 369, 371. In that case, the Court instructed the jury:

> "It is the duty of the operator of an automobile upon a highway or street to avoid causing injury, and this duty requires him to take into consideration the character of his machine, whether in its operation it is practically noiseless, its power, the manner in which it runs, whether it is operated in a populous part of the city and upon a much traveled street, and from these and other pertinent considerations to proceed with that speed and caution *which reasonable care requires* according to the place and presence of other travelers and vehicles." (Our italics.)

In reversing a judgment for the plaintiff, the Appellate Court said of this instruction:

> "By the first part of this instruction the jury is told that it is the duty of the operator of an automobile upon a highway or street to avoid causing injury. This part of the instruction imposes upon the operator of an automobile the obligations of an insurer. If he so operates his automobile that no injury is caused thereby, he has discharged his duty, but, if any one is injured as a result of such operation, he has violated his duty, and is liable. The law does not impose so high a duty. It is the duty of a person driving an automobile to use ordinary care to avoid causing injury in view of the conditions and circumstances. The latter part of the instruction does not cure the error contained in the first part. It is probable that the latter part of the instruction is susceptible of the meaning that only ordinary care is required of the driver of an automobile, but, when it is considered in relation to the former part, it is doubtful whether the jury so understood it. In any event, the two parts of the instruction are contradictory; the first part imposing a duty of a much higher class than the last part. The instruction, at the best, announces two standards of duty by which the jury was authorized to measure the conduct of appellant for the purpose of deciding

> whether or not he was negligent, and we cannot say which one of these standards was applied. The error was necessarily prejudicial. A contradictory or confusing instruction cannot be regarded as harmless."

Rump v. *Woods* is on all fours with the present case. In that case, the jury was told that the operator of a vehicle must avoid causing injury, and was then told that he must proceed with the care and caution which reasonable care dictates. In this case, the jury was told that the Standard driver must so restrict his speed as to avoid a collision, and was then told that speed must be restricted as described in accordance with legal requirements and the duty of all persons to use due care. The Appellate Court of Indiana held the instruction in *Rump* v. *Woods* constituted reversible error. We submit that the Circuit Court of Appeals, bound to follow the law of Indiana, must likewise hold such an instruction to be reversible error.[8]

Precisely to the same effect is the case of *Martin* v. *Lilly*, 188 Ind. 139, 121 N. E. 443, commented upon *supra*, page 12, in which the Supreme Court of Indiana said:

> "When an instruction such as No. 8 is given, it cannot be cured by others which state the rule correctly; because, every time the Court tells the jury in other instructions that the driver is required to use the care that an ordinarily prudent person would exercise in like circumstances, the jurors, if obedient to the oath, are bound to observe that this means 'constant lookout'."

The Circuit Court of Appeals states in its opinion that the concluding prepositional phrase "left the question of fact for the jury." Under the Indiana authorities above cited, this is not true. The cases hold that the prepositional phrase "in compliance with legal requirements and

8. The *Rump* case is "part of the available data" which it was the duty of the Circuit Court of Appeals to consider. See *West* v. *American Tel. and Tel. Co.*, Note 7, *supra*.

the duty of all persons to use due care" is modified by the preceding language and thus means that these legal requirements and due care required the operator "to so restrict his speed as to avoid colliding with any other vehicle on the highway." Under the instruction, once it was established that a collision occurred, the jury was duty-bound to find the Standard driver negligent. Any way the instruction is read, and by all the rules of construction as announced by the appellate courts of Indiana, the prepositional phrase "in compliance with legal requirements and with the duty of all persons to use due care" tells the jury that legal requirements and the duty to use due care require that speed be so restricted as "to avoid colliding with any * * * vehicle on * * * the highway." The duty is absolute under all circumstances.

The doctrine of the *Heiny* case, 221 Ind. 367, *supra*, page 16, applies with equal force to this proposition. The Court there held, in spite of the statute requiring a truck driver to stop and not proceed across a railroad track until he had *ascertained definitely* that no train was approaching, that:

> "In this state, we recognize no degrees of actionable negligence other than that which results in the failure or refusal to exercise ordinary care."

Again, the Circuit Court of Appeals failed to consider "all the available data" in determining the law of Indiana. It ignored the controlling Indiana cases, and neither it nor respondents were able to cite any Indiana cases to the contrary.

It is respectfully submitted that the Circuit Court of Appeals erred in failing to follow and apply the law of Indiana to the questions presented in this case. It is also respectfully submitted that this case presents a question of substance and importance which should be reviewed by

this Court, and that upon such review, the judgment of the Circuit Court of Appeals be reversed.

Respectfully submitted,

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WALTER C. WILLIAMS,
Attorney for Petitioner, Martha Nichols as Administratrix.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. 264

WILLIAM F. DROHAN AND DANIEL D. CARMELL AS TRUSTEES FOR KEESHIN MOTOR EXPRESS CO., INC., IN REORGANIZATION CAUSE 46-B-26 NORTHEAST DISTRICT OF ILLINOIS,

Plaintiffs-Respondents,

vs.

STANDARD OIL COMPANY, A CORPORATION,

Defendant-Petitioner.

STANDARD OIL COMPANY, A CORPORATION,

Cross-Claimant-Petitioner,

vs.

KEESHIN MOTOR EXPRESS CO., INC., A CORPORATION; AND C. A. CONKLIN TRUCK LINE, INC., A CORPORATION,

Cross-Defendants-Respondents.

MARTHA NICHOLS, AS ADMINISTRATRIX OF THE ESTATE OF FERRIS NICHOLS, DECEASED,

Cross-Claimant-Petitioner,

vs.

KEESHIN MOTOR EXPRESS CO., INC., A CORPORATION; AND C. A. CONKLIN TRUCK LINE, INC., A CORPORATION,

Cross-Defendants-Respondents.

BRIEF IN REPLY TO ANSWER BRIEF OF RESPONDENTS DROHAN AND CARMELL, AS TRUSTEES.

RICHARD P. TINKHAM,
JOHN F. BECKMAN, JR.,
Attorneys for Petitioner Standard Oil Company.
WALTER C. WILLIAMS,
Attorney for Petitioner Martha Nichols as Administratrix.

IN THE

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OCTOBER TERM, A. D. 1948.

No. 264.

WILLIAM F. DROHAN AND DANIEL D. CARMELL AS TRUSTEES FOR KEESHIN MOTOR EXPRESS CO., INC., IN REORGANIZATION CAUSE 46-B-26 NORTHEAST DISTRICT OF ILLINOIS,

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Cross-Claimant-Petitioner,

vs.

KEESHIN MOTOR EXPRESS CO., INC., A CORPORATION; AND C. A. CONKLIN TRUCK LINE, INC., A CORPORATION,

Cross-Defendants-Respondents.

BRIEF IN REPLY TO ANSWER BRIEF OF RESPONDENTS DROHAN AND CARMELL, AS TRUSTEES.

To the Honorable Fred M. Vinson, Chief Justice of the United States and the Associates Justices of the Supreme Court of the United States.

Your petitioners, Standard Oil Company, a corporation, and Martha Nichols, as Administratrix of the Estate of

Ferris Nichols, deceased, for reply to the answer brief of the respondents, Drohan and Carmell, as Trustees, would respectfully show the Court as follows:

The petitioners' original brief contains replies to Propositions I and II (a), as set forth in the brief of the respondents, Drohan and Carmell, as Trustees. This reply, therefore, will be addressed solely to Proposition II (b), set forth in respondents' brief, page 7.

The answer given by the respondents, Drohan and Carmell, as Trustees, to Proposition III, set forth in the brief in support of the petition (page 17), is that under the law of Indiana, the petitioners were guilty of negligence as a matter of law when the vehicle belonging to the petitioner Standard and being driven by Ferris Nichols collided with the vehicle belonging to respondents and that, therefore, the instruction was correct. In support of this proposition, the respondents rely upon three Indiana cases—*Pennsylvania R. Co.* v. *Huss,* 96 Ind. App. 71, 180 N. E. 919; *C. C. C. & St. L. Ry. Co.* v. *Gillespie,* 96 Ind. App. 535, 173 N. E. 708, and *Pitcairn* v. *Honn,* 109 Ind. App. 428, 32 N. E. (2) 733.

It will be observed that these cases are all cases from the inferior appellate tribunal of the State of Indiana. The proposition which respondents claim was announced in these cases has been criticized by the Supreme Court of Indiana and, in fact, repudiated and overruled by that court. The Honn case itself recites the criticism of the previous decisions by the Supreme Court.

In the subsequent case of *Opple* v. *Ray* (1935), 208 Ind. 450, 195 N. E. 81, 84, the Supreme Court of Indiana said in repudiating both the Huss and Gillespie cases:

> "In both cases it was held that to drive an automobile at such a speed that it could not be stopped within the distance that objects could be seen ahead of it was contributory negligence as a matter of law,

and the question of proximate cause is not properly submitted to the jury. Many cases from many jurisdictions are cited to support the proposition, but it seems to us that the statement is too broad."

Likewise, in the later case of *New York Central R. Co.* v. *Casey* (1938), 214 Ind. 464, 14 N. E. (2) 714, 717, the Supreme Court of Indiana repudiates the proposition that one who collides with another vehicle is guilty of negligence as a matter of law, and limits the scope of the Huss and Gillespie decisions solely to the point that in neither case had the defendant railroad company been shown to have been guilty of any negligence.

A further example of the resort to simulation by respondents in an attempt to support an incorrect opinion is the incomplete quotation from *Opple* v. *Ray*, 208 Ind. 450, 195 N. E. 81, 85, appearing at page 10 of their brief. We set out herewith the entire quotation and have italicized the omitted portion:

> "A driver is bound to observe the red tail-light of a car in front of him proceeding in the same direction, *and, still, he is not necessarily chargeable with negligence should he collide with such a car if it should stop suddenly and unexpectedly and without signaling.*"

Respondents likewise rely on the fact that in a general instruction, the trial court told the jury that the operator of the Standard vehicle was required to exercise the care which a reasonable and prudent person would exercise under the same or similar circumstances. They urge that the instructions should be considered as a whole and that this general instruction cures the more specific instruction as to the duty of the operator of the vehcile under certain circumstances therein defined. They deem this proposition too elemental for the citation of authority. Unfortunately for respondents, this is not the law of Indiana.

As set out in petitioners' original brief, when an instruction concerning the obligation of a motor vehicle operator under certain specific circumstances is given, and that instruction is erroneous, it cannot be cured by others which state the rule correctly because "every time the Court tells the jury in other instructions that the driver is required to use the care that an ordinarily prudent person would exercise in like circumstances, the jurors, if obedient to the oath, are bound to observe" that reasonable care means the specific obligations previously defined. (*Martin* v. *Lilly* (1919), 188 Ind. 139, 121 N. E. 443, 445, (Petitioners' Brief, p. 12); and *Rump* v. *Woods* (1912), 50 Ind. App. 347, 98 N. E. 369, 371, (Petitioners' Brief, p. 19.))

It is not the law of Indiana, as respondents would have this Court believe, that a motor vehicle operator colliding with another vehicle on the highway is guilty of negligence as a matter of law. It is the law that the operator of a vehicle is charged with the duty to exercise reasonable care to avoid colliding with another vehicle on the highway, whether such care has reference to the duty to keep a lookout or the duty to restrict speed. This is the only duty under the law of Indiana. (*Heiny* v. *Pennsylvania R. Co.* (1943), 221 Ind. 367, 47 N. E. (2) 145, Petitioners' Brief, pp. 16 and 21.)

Respondents, by failing to answer or comment upon the propositions and data contained in petitioners' brief (p. 8, *et seq.*) pertaining to the substance and importance of the question, have inferentially admitted that, if petitioners are correct as to the law of Indiana, the decision of the Circuit Court of Appeals will affect a substantial and important number of cases in the Indiana federal courts. Under the rules of law as announced by the Circuit Court of Appeals for the Seventh Circuit in this case, federal court litigants in motor vehicle cases must "regularly and continuously observe the highway * * * so as to dis-

cover any vehicle * * *," and so restrict the speed of their vehicles as "to avoid colliding with any * * * vehicle." If the operator suffers a collision to occur, he is thus guilty of negligence on two grounds as a matter of law. On the other hand if by fortuitous circumstance the operator finds himself in an Indiana state court, his conduct will be measured by that of a reasonable and prudent person under similar circumstances. Substantially different results in the two court systems are inevitable if this decision is permitted to stand.

Commenting upon the application of the case of *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, 58 S. Ct. 817, this Court said in the landmark case of *Guaranty Trust Co.* v. *York,* 326 U. S. 99, 89 L. Ed. 2079, 2086:

> "In essence, the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court. The nub of the policy that underlies *Erie R. Co.* v. *Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result."

Petitioners, therefore, respectfully submit that this is a proper case for the granting of the writ, and that upon review the judgment of the Circuit Court of Appeals be reversed.

Respectfully submitted,

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Attorneys for Petitioner Standard Oil Company.
WALTER C. WILLIAMS,
Attorney for Petitioner Martha Nichols as Administratrix.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. 264

WILLIAM F. DROHAN and DANIEL D. CARMELL, as Trustees for Keeshin Motor Express Co., Inc., in Reorganization Cause 46-B-26 Northeast District of Illinois,

Plaintiffs-Respondents,

vs.

STANDARD OIL COMPANY, a corporation,

Defendant-Petitioner.

STANDARD OIL COMPANY, a corporation,

Cross-Claimant-Petitioner,

vs.

KEESHIN MOTOR EXPRESS CO., INC., a corporation; and C. A. CONKLIN TRUCK LINE, INC., a corporation,

Cross-Defendants-Respondents.

MARTHA NICHOLS, as Administratrix of the Estate of Ferris Nichols, deceased,

Cross-Claimant-Petitioner,

vs.

KEESHIN MOTOR EXPRESS CO., INC., a corporation; and C. A. CONKLIN TRUCK LINE, INC., a corporation,

Cross-Defendants-Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Fred M. Vinson, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States.

Your Respondents, William F. Drohan and Daniel D. Carmell, as Trustees for Keeshin Motor Express Co., Inc., in Reorganization Cause 46-B-26, Northwest District of Illinois, as Plaintiffs-Respondents respectfully respond in opposition to the petition of the Standard Oil Company, a corporation and Martha Nichols, as Administratrix of the Estate of Ferris Nichols, deceased, for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

In the interest of brevity Respondents adopt the abbreviations as set forth in petitioners' petition on page 2.

ARGUMENT.

I.

The question is not an important question of local law.

Since only the propriety of two instructions is involved in this application for a Writ of Certiorari, no real qualifying basis exists to recommend the instant case to this court for review. Instructions must perforce be characterized and limited by the special facts under consideration and in the light of the issues on trial and the evidence introduced to support them. The Circuit Court of Appeals after studying all the instructions involved in this case felt that the given instructions properly and fully announced the correct propositions of law applicable to this case. Both instructions questioned have been approved in substance by the Supreme Court of Indiana. Instructions are to be read as a series and it would be uncomplimentary to your Honor's legal back ground to cite authorities enunciating that academic proposition of law.

The so-called important legal propositions are only imagined and have no actual existence. At this juncture we respectfully call this court's attention not only to the decision itself but to page 11, footnote 5 where the Petitioners indulge in some fancy hair splitting when they state "However, in this case, the opinion of the Circuit Court of Appeals is so written that it appears on its face to adhere to the rules of decision of the State of Indiana. Therefore it becomes essential to demonstrate to this court that such is not the fact, and that since the opinion, two divergent and conflicting rules exist."

We do not care about demonstrations and surely with the ever increasng volume of litigation, this Court does not

have the time to find distinctions in things that admit of no distinction. The following statement appearing in 48 Har. Law Review 269 under the title "The Business of the Supreme Court at October Term, 1933" adequately evaluates the limitations of certiorari:

> "As to probable conflict with local decisions, for the most part the "important questions of local law" urged by practitioners are questions as to the law of master and servant in negligence cases, and the like. [This case involves only two instructions.] Diversity of citizenship jurisdiction is the great feeder of such controversies. For the bulk of ordinary private litigation arising from that jurisdiction the circuit courts of appeals are, and must be courts of last resort, tribunals of final authority as to the law of states which lie within their circuit. This is not to say that the correct decision of such cases is not important; it is only to say that the importance is of a different quality. The Supreme Court cannot undertake to see that every case in a Federal Court is decided as a State Court would have decided it. At best it must confine its interposition to cases in which a circuit court of appeals has announced a rule, potentially governing a substantial number of other cases in conflict with a rule announced by authoritative State Court decisions."

However, in the instant case no different result would have been obtained had the case been tried in the State Court and we have no quarrel with the propositions of law advanced in *Erie* v. *Tompkins,* 304 U. S. 64, 50 S. Ct. 817, *Guaranty Trust Co.* v. *York,* 326 U. S. 99, 65, S. Ct. 1464 or the case of *Fidelity Union Trust Co.* v. *Field,* although these decisions have no application to the case at bar because the Circuit Court of Appeals did not decide important questions of law in conflict with applicable decisions of the State of Indiana.

II.

The Circuit Court of Appeals did not decide a question of local law in conflict with applicable decisions.

(a)

The instruction that the operator of the Standard Vehicle was "To regularly and continuously observe the highway ahead of him so as to discover any vehicle or other conveyance on the highway" correctly embodied the law of the State of Indiana.

The instruction is set forth (R. 208) and the Circuit Court of Appeals in upholding such instruction stated (R. 295),

> "It is clear that the language used in the instruction in our case is the equivalent of the language used in the *Pfisterer* case, *supra,* and since by the provisions of 47-2004 it was the duty of a driver, having regard to the actual and potential hazards, not to drive his vehicle at a speed greater than was reasonable and prudent, it cannot be said, *under the circumstances here appearing,* that the court committed reversible error." (Last italics ours.)

The instruction is based on the application of a statute, Burns Ind. Stats. Anno., Sect. 47-2004 which provides among other things as follows:

> "Speed regulations (a) No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing. In every event speed shall be so restricted as may be necessary to avoid colliding with any person or vehicle or other conveyance on or near or entering the highway in compliance with legal requirements and the duty of all persons to use due care."

Still another statute was then and there in force and effect which provided (Burns' Stats. Anno. 1940 Replacement, Sect. 47-513), as follows:

> "In approaching a pedestrian who is walking or standing upon the traveled part of any highway and not upon a sidewalk and upon approaching an intersecting highway or curve or a corner in a highway where the operators view is obstructed, every person driving or operating a motor vehicle or motor-bicycle shall slow down and give a timely signal with the bell, horn or other device for signalling."

The Supreme Court of Indiana, in the case of *Pfisterer* v. *Key* (1941), 218 Ind. 521, 33 N. E. (2d) 330, stated:

> "The *Martin* v. *Lilly* case was decided before the statute above referred to was enacted by the 1925 Legislature (Burns' Ind. Stat., 1940 replacement, Sect. 47-513), and the duties imposed upon the drivers of motor vehicles by the provisions of that statute were not involved. For that reason the case is not controlling."
>
> "Appellant says that by the use of the words 'constantly observe' the jury was told that appellant must keep his eyes constantly on the roadway while he was driving. Webster defines the verb 'observe' as, to take notice; to be attentive, and the word 'constant' as, continually recurring, regular, steady, and the word 'constantly' as in a constant manner, uniformly, continuously. So the phrase 'constantly observe the highway' would mean literally, to continually or regularly pay attention to the highway. *We think the statute above referred to (47-513) does make it the duty of a driver of an automobile to regularly and continuously pay attention to the highway.* To be sure, looking to the right or to the left to see if another vehicle or any other object was about to come on the highway from either side would be observing the highway. But we can understand how the jury might get a more narrow view from the wording of the instructions, and for that reason we could not approve it as a model instruction." (Our italics.)

The Standard driver in the instant case was required by Section 47-513 of Burns' Ind. Stats. Anno. to slow down and give a signal in approaching a pedestrian and by Section 47-2004 to so restrict his speed as might be necessary to avoid colliding with any vehicle on the highway. If it was necessary for him to regularly and continuously observe the highway ahead of him to comply with Section 47-513, it was equally necessary for him to do so to comply with Section 47-2004. It is obvious that he could not comply with either statute unless he regularly and continuously observed the highway ahead of him.

(b)

The instruction "At the time of the accident in question, the law of Indiana required the speed of every vehicle operated upon the highways of this state to be so restricted as might be necessary to avoid colliding with any person, or vehicle, or other conveyance on or near or entering the highway in compliance with legal requirements and with the duty of all persons to use due care," embodied the words of the statute and was proper.

The above instruction was approved by the trial court, both before and at the time it was given and on the motion for a new trial; it was subsequently screened by the Circuit Court of Appeals in its opinion and under the appellants' petition for a rehearing.

A reading of the instruction discloses that the very words *due care* were employed in the instruction and in the conjunctive sense.

It employs the very language of the statute Burns' Stats. Anno. Section 47-2004 and applies the statute in these words "if you find that the facts and circumstances were such that he should have so restricted his speed in such compli-

ance, then such failure would be negligence as a matter of law."

The instruction as given left the question of fact (speed) a question for the jury which the jury resolved against Standard and Nichols.

We admit that the instruction given in *Schlarb* v. *Henderson*, 211 Ind. 1, 4 N. E. (2) 205, 207, left no question of fact to be determined by the jury.

In the cases, *Schlarb* v. *Henderson* and *Oppel* v. *Ray*, cited by Standard, the statute involved required every motor vehicle operated on a public highway at night to be equipped with two lighted head lamps which should throw sufficient light ahead to render an object or person on the roadway straight ahead visible for a distance of at least 200 feet. The court held that this statute created a mechanical standard for lighting equipment and did not create a standard of care in the operation of such vehicles. The court in the *Oppel* v. *Ray* case said that the standard of care was fixed by the speed statute then in force, namely, Section 47-516 Burns' Ind. Stat. Anno. 1933. After quoting the statute, the court said,

> "This is the measure of care required of the driver of a motor vehicle upon the highway."

The instruction under scrutiny uses the exact wording of Section 47-2004, Burns' Ind. Stats. Anno. (1940 Replacement) which was the speed statute in force at the time of the occurrence in question and which replaced Section 47-516. On the authority of *Oppel* v. *Ray*, Section 47-2004 did create a standard of care for the Standard driver at the time and place of the collision in question and the court, of course, was not in error in quoting it in its instructions.

Standard also cites the case of *Heiny* v. *Pennsylvania R. R. Company*, 221 Ind. 367, 47 North Eastern (2nd) 145, in support of its contention. The statute involved in the

Heiny case required the driver of a truck containing inflammables before crossing a railroad to stop and to ascertain definitely that no train was approaching and was in such close proximity as to create a hazard of a collision. The point decided was the statue only required a driver to exercise reasonable care in ascertaining whether or not a train was approaching, and the mere fact a collision occurred did not necessarily mean that the driver was guilty of contributory negligence as a matter of law. The Court did not overrule or criticize the case of *Pfisterer* v. *Key* and certainly did not hold that it was *not* the duty of a truck driver to regularly and continuously observe the highway ahead of him in order to avoid striking a pedestrian or a vehicle on the highway.

In the case of *Rump* v. *Woods* (1912), 50 Ind. App. 347, 98 N. E. 369, no statute was involved and the wording of no statute was embodied in the instruction. The aspects of the statute Sect. 47-2004, which the Circuit Court of Appeals construed was enacted in 1939, twenty-seven years after the *Rump* v. *Woods* (1912) case was adjudicated.

In the very recent case of *Rentschler* v. *Hall,* ... Ind. App. ..., 69 N. E. (2) 619, at page 633, the Appellate Court of Indiana stated,

> ". . . the violation of a statutory duty ordinarily constitutes negligence *per se,* and not, as in the minority view, that such a violation can amount to only a circumstance to be considered, with the circumstances, on the question of negligence. . . ."

The violation of Section 47-2004, Burns' Stats. Anno. (1940 Replacement) by Standard and Nichols was negligence as a matter of law and in the *Rentschler* v. *Hall* case the court approved an instruction to that effect, page 624.

The court in the *Rentschler* v. *Hall* case cited with approval *Pennsylvania Railroad Co.* v. *Huss,* 96 Ind. App. 71, 180 N. E. 919, wherein the court in construing the

then existing speed statute Sec. 10140, Burns' Supp. 1929, superseded by Section 47-2004 of Burns, stated,

> "It was negligence as a matter of law for Miss Menzel to drive the automobile . . . at such a speed that she could not stop the same within the distance that objects could be seen ahead of it."

This proposition of law has been approved by the courts of the State of Indiana in *C. C. C. and St. L. Ry. Co.* v. *Gillespie* (1930), 96 Ind. App. 535, 173 N. E. 708, and *Pitcairn* v. *Honn* (1941), 109 Ind. App. 428, 32 N. E. (2) 733.

The rule of conduct prescribed by the law of Indiana in the case of *Opple* v. *Ray*, 208 Ind. 450, 195 N. E. 81, is correct, but such rule, "he will see any *dangerous* obstruction" (Our Italics) is not applicable to the instant case for the court in the same case states, page 460:

> "A driver is *bound* to observe the red tail light of a car in front of him, proceeding in the same direction. . . ." (Italics ours.)

The Circuit Court of Appeals recognized the distinction petitioners now claim exists when they stated (R. 296):

> "But the instruction in question provided that the speed of every vehicle should be so restricted, 'in compliance with legal requirements and with the duty of all persons to use due care,' and concluded that 'if you find that the facts and circumstances were such that he should have so restricted his speed in such compliance, then such failure would be negligence as a matter of law.' Thus it is clear that the instruction as given left the question of fact for the jury."

The trial court went further and did instruct the jury as to what care a reasonable and prudent man should use under like or similar circumstances (R. 208), when the court charged as follows:

> "At the time and place of the occurrence in question the driver of the truck of the defendant Standard Oil Company was required to exercise that degree of

care to keep his truck under control which a reasonable and prudent person would exercise under the same or similar circumstances."

The trial court and the Circuit Court of Appeals both recognized the fact that there are no degrees of care in the State of Indiana and the instructions of the trial court were all based on such theory.

Conclusion.

Since only the propriety of two instructions is involved, no question of substance and importance is presented. The Circuit Court of Appeals followed and applied the law of Indiana to the issues involved on this case, resultingly the granting of the writ should be denied.

Respectfully submitted,

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